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No. 92-344

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, *ET AL.*,

Petitioners,

v.

HAITIAN CENTERS COUNCIL, INC., *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* THE LAWYERS COMMITTEE FOR HUMAN RIGHTS IN SUPPORT OF RESPONDENTS

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37 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page

CONSTITUTION, TREATIES, STATUTES, AND REGULATIONS

Page

LEGISLATIVE MATERIALS

MISCELLANEOUS

Page

INTEREST OF THE *AMICUS*

Amicus curiae the Lawyers Committee for Human Rights offers this brief, with the consent of the parties, in support of respondents Haitian Centers Council, Inc., *et al.* The Lawyers Committee is a national legal resource center working in the area of human rights, refugee and asylum law. In 1980, after the enactment of the Refugee Act[1], the Committee created a national Refugee Project to monitor proposed legislation and regulations, to litigate significant cases regarding refugees and asylum, and to assist in providing legal representation to applicants for political asylum. *Amicus* believes that the resolution of this case may affect numerous applications for protection under the 1951 Convention[2] and the 1967 Protocol relating to the Status of Refugees[3] (Convention and Protocol).

STATEMENT OF THE CASE

Article 33 of the 1951 Convention (hereinafter "Article 33"), which embodies the core obligation assumed by the United States when it ratified the 1967 Protocol,[4] provides that:

> No contracting party shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion.

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[1] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of Title 8 of the United States Code).

[2] July 28, 1951, 189 U.N.T.S. 150.

[3] Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

[4] G.S. Goodwin-Gill, *The Refugee in International Law* 72 (1983). Under Article I(1) of the 1967 Protocol, the United States has agreed to apply Articles 2 to 34 inclusive of the 1951 Convention.

On May 24 of this year, President Bush issued what has become known as the Kennebunkport Order,[5] which instructs the Coast Guard to interdict vessels on the high seas suspected of containing Haitians destined for U.S. shores and to return such persons directly to Haiti without regard to whether their life or freedom would be threatened there on the grounds listed in Article 33.

Respondents sought to enjoin petitioners from enforcing the Kennebunkport Order on the ground that it violated both federal statutes and Article 33. The district court held that the statutes on which respondents relied did not prohibit petitioners from returning refugees to their persecutors if the persons were intercepted before reaching our shores. It recognized that Article 33 does prohibit the return of such refugees, but it denied relief because it believed that it was constrained by the Second Circuit's decision in *Bertrand* v. *Sava*, 684 F.2d 204 (2d Cir. 1982), which the court read as holding that "the Protocol's provisions are not self-executing." App. 167a.[6] The court said that this ruling rendered Article 33 "a cruel hoax . . . not worth the paper it is printed on," *id.*, and it invited the Second Circuit to reconsider its *Bertrand* decision. The Second Circuit had no occasion to consider the self-execution issue, however, as it held that the statutes respondents relied on did prohibit the petitioners from intercepting refugees on the high seas and returning them to their persecutors.

This brief addresses only the question whether Article 33 is self-executing. The issue arises only if this Court holds that the statutes respondents rely on do not apply to refugees on the high seas, but that Article 33 does apply to such refugees. We therefore examine the self-execution issue in this brief on those assumptions.

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[5] Exec. Order No. 12807, 57 Fed. Reg. 23133 (1992).

[6] "App." refers to the appendix to the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

Petitioners argued below that Article 33 is non-self-executing in four respects. First, they contended that Article 33 did not become the law of the land when the United States acceded to the Protocol, but had to be given domestic legal force by legislation. Second, they argued that the Protocol did not itself prohibit the United States from delivering refugees to their persecutors, but instead obligated the United States to pass legislation prohibiting such delivery. Third, they maintained that Article 33 did not establish rights that are amenable to judicial enforcement without legislative clarification. Finally, they argued that the Protocol does not itself confer a private right of action. The first three arguments lack merit, the last is irrelevant.

By virtue of the Supremacy Clause, Article 33 became the "supreme Law of the Land" upon ratification. Its status as law of the land does not depend, as petitioners argued below, on the treaty-makers' intent to give it domestic legal force. This Court need not decide whether the treaty-makers can deprive a treaty of domestic legal force by affirmatively manifesting an intent that it *not* be the law of the land, for the treaty-makers did not manifest any such intent with respect to the Protocol. Thus, the obligation established by Article 33 has the force of domestic law in the United States.

Under *Foster v. Nielson*, 27 U.S. (2 Pet.) 253 (1829), Article 33 would be unenforceable in court if the obligation it establishes is an obligation to "pass acts" prohibiting the return of refugees to their persecutors. But the plain text of Article 33, this Court's decisions in *INS* v. *Cardoza Fonseca*, 480 U.S. 421 (1987), and *INS* v. *Stevic*, 467 U.S. 407 (1984), and the statements of executive branch officials when the Protocol was transmitted to the Senate make it clear that the obligation established by the Protocol is not an obligation to pass legislation, but an obligation not to return refugees to their

persecutors. Article 33 directly limited petitioners' discretion and conferred correlative rights on refugees.

There is nothing about the obligation imposed by Article 33 that makes it unsuitable for judicial enforcement. The obligation is mandatory, immediately effective, and clear-cut. This Court had little trouble in *Stevic* discerning the content of the non-refoulement obligation, and petitioners and the courts enforce it routinely with respect to refugees who have reached our shores.

Finally, this Court need not decide whether Article 33 itself confers a private right of action for injunctive relief. Respondents' right of action is conferred by the APA.

ARGUMENT

The lower courts consider the doctrine of self-executing treaties to be "one of the most confounding in treaty law."[7] They appear to agree that a non-self-executing treaty is one that must be "implemented" by legislation before it may be applied by the courts, but they differ on why legislation is necessary – that is, on what it is that a non-self-executing treaty fails to accomplish *ex proprio vigore*. Courts have, at various times, discussed the "self-execution" question as if it concerned each of the deficiencies that petitioners ascribe to Article 33.

The label "non-self-executing" can properly be used to describe a treaty with any of those deficiencies. Outside the treaty context, it is understood that the term does not describe a fixed legal attribute of a law, but denotes that a law does not accomplish some legal end itself but contemplates that the end

[7] See *United States* v. *Postal*, 589 F.2d 862, 876 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979); *United States* v. *Noriega*, No. 88-79-Cr, 1992 U.S. Dist. LEXIS 18686 (S.D. Fla. Dec. 8, 1992).

will be accomplished through further legislation.[8] With respect to treaties, however, the term has produced confusion because it has mistakenly been thought to be a term of art concerning a doctrine unique to treaties.

Although petitioners below attempted to perpetuate and exploit the lower courts' confusion, their submissions ultimately recognized what commentators have been saying for some time:[9] the term "self-executing" does not describe a fixed legal attribute of treaties and is analytically useless and potentially very confusing.[10] Petitioners argued below that, when the BIA

[8] Thus, the dormant commerce clause is sometimes described as self-executing because it itself preempts state regulation, *see, e.g., Wardair Canada Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 7 (1986), while the takings clause has been described as self-executing because it itself confers a remedy for its violation, *see, e.g., First Eng. Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 305 (1987). *See generally* Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 Colum. L. Rev. 1082, 1120-1121 (1992).

[9] *See* Vázquez, *supra* note 8, at 1120-21 (1982); Koh, *Transnational Public Law Litigation*, 100 Yale L.J. 2347, 2383 (1991); Paust, *Self-Executing Treaties*, 82 Am. J. Int'l L. 760, 783 & n.132 (1988); McDougal, *The Impact of International Law upon National Law: A Policy-Oriented Perspective*, 4 S.D.L. Rev. 25, 77 (1959) ("The words self-executing and non-self-executing embrace neither intrinsic nor historic meaning nor magic to resolve the issue."); McDougal, *Remarks*, 45 Proc. Am. Soc'y Int'l L. 102 (1951).

[10] Failure to recognize the diversity of concepts that may be analyzed using the "self-executing" label produces confusion, for example, when one court holds that a treaty is not self-executing because it does not itself confer a cause of action and a later court applies that precedent to dismiss a treaty claim in a case in which the litigant does not rely on the treaty as the source of his cause of action. This is the mistake petitioners asked the courts below to make when, relying on *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985), and other cases, *see infra* note 50, they asked the court to dismiss respondents' complaint on the ground that the Protocol does not itself confer a private right of action and is thus not self-executing. *See generally infra* Part IV.

described the Protocol as self-executing in *In re Dunar*, 14 I.&N. Dec. 310 (1973), it meant only that the Protocol of its own force established an obligation to enact legislation prohibiting the return of refugees to a place where they would be persecuted.[11] This is perhaps the least likely way in which a court would use the term, and we do not agree that is what the BIA meant. But we agree that, as a matter of English usage, the term may be understood in that sense. Petitioners' attempt to explain away the BIA's statement in *In re Dunar* thus demonstrates as convincingly as anything we could have said that the term "[is] essentially meaningless, and . . . the quicker we drop it from our vocabulary the better for clarity and understanding."[12] We join petitioners in urging the Court not to attach any weight to conclusory statements that Article 33 is or is not self-executing.[13] Below, we examine in turn the four distinct respects in which petitioners have claimed Article 33 is not self-executing.

I. THE PROTOCOL IS THE SUPREME LAW OF THE LAND.

The Supremacy Clause declares that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const., art. VI, cl. 2. The Protocol is a treaty, valid and in force, made under the

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[11] *See* Defendants' Opposition to the Entry of Injunctive Relief Respecting the New Executive Order (E.D.N.Y.) ("Def. Opp.") 29; Brief for the Appellants in *Baker* ("*Baker* Brief") 28. We refer to the Government's briefs in *Haitian Refugee Ctr., Inc. v. Baker*, 949 F.2d 1109 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1245 (1992), as briefs in *Baker*.

[12] McDougal, 45 Proc. Am. Soc'y Int'l L. 102.

[13] These include the statements in the principal cases on which petitioners rely. *Baker, supra*; *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 751 (1991); *Haitian Refugee Ctr., Inc.* v. *Gracey*, 600 F. Supp. 1396 (D.D.C. 1985), *aff'd on other grounds*, 809 F.2d 794 (D.C. Cir. 1987).

authority of the United States. It follows that the Protocol is the supreme law of the land, and thus has the force of domestic, as well as international, law.

Despite the clarity and force of the foregoing syllogism, petitioners have argued that the Protocol does not have domestic legal force.[14] This rather bold position is based on the notion that treaties that are not "self-executing" are not the law of the land. Such treaties, according to petitioners, may impose international obligations on the United States, but those international obligations do not have the force of domestic law.[15] This notion has been combined by certain courts with the idea that a treaty's self-executing character is largely a matter of intent, to produce the conclusion that a treaty is the law of the land only if the U.S. treaty-makers intended that it be the law of the land.[16] As applied to the Protocol, this analysis accepts that the Protocol might establish an international

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[14] *See* Opp. Brief (2d Cir.) ("Opp. Brief") 35 ("No evidence suggests that the United States intended by its acceptance of the Protocol to incorporate Article 33 into domestic law . . ."); Def. Opp. 26. ("There is no indication that the United States intended by its acceptance of the Protocol to incorporate Article 33 into domestic law as a private cause of action."). *See also* Appellants Reply Brief ("*Baker* Reply Brief") 8 ("[Treaties] may impose obligations under international law on the United States as a contracting party without themselves creating obligations under domestic law . . ."); *Baker* Brief 24 (same as Def. Opp.); Defendants' Mem. Opposing Injunctive Relief in *Baker* (S.D. Fla.) ("Def. Opp. in *Baker*") 30 ("[T]he statement and actions of the executive and Congress provide the best indication of whether Article 33 was intended to become part of domestic law directly, without implementing legislation."); *id*. at 32 ("Had Article 33 of the Protocol been viewed as self-executing, that provision itself would have been domestic law . . .").

[15] *See Baker* Reply Brief 8, *supra* note 16.

[16] This was essentially the reasoning of the court in *Postal*, *supra*, on which petitioners relied below and in *Baker*. *See* Opp. Brief 35; Def. Opp. 26; *Baker* Reply Brief 8; *Baker* Brief 24-26; Emergency Motion for Stay Pending Appeal in *Baker* (11th Cir.) 19; Def. Mem. Opp. in *Baker* 29-30, 34.

obligation not to deliver refugees to their persecutors, but maintains that this obligation does not have the force of domestic law unless the President and/or the Senate so intended.

If our Constitution did not include the Supremacy Clause, all treaties would have the force of law internationally but not domestically. That has long been the rule in Great Britain. In that country, treaties can never be applied by domestic law-applying officials, such as judges, but must instead be executed by Parliament, whose statutes would in turn be enforced by domestic law-applying officials.[17]

This, however, is the rule that the Framers of our Constitution rejected when they adopted the Supremacy Clause. By declaring treaties to be laws, the clause gives treaties domestic legal force and thus makes them directly enforceable by domestic law-applying officials (such as judges) without the need for execution by domestic law-making officials (*i.e.*, Congress).

Petitioners' view of the self-execution doctrine cannot be squared with the text of the Supremacy Clause. It would interpret the Supremacy Clause as a *power-conferring* provision: the clause would give the treaty-makers the *power* to make treaties the law of the land. But that is not what the clause says. The Constitution gives the treaty-makers the power to make treaties, but the Supremacy Clause by its terms gives the treaties they make automatic domestic legal force. Moreover, the clause purports to give domestic legal force to "all" such

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[17] O'Higgins & Dublin, *Unlawful Seizure and Irregular Extradition*, 36 Brit. Y.B. Int'l L. 279, 301 (1960). This is so regardless of the treaty's terms. For example, even if a treaty purports itself to set a tariff at a given level, domestic law-applying officials would collect the tariff as set by prior statutes until Parliament executed the treaty by amending the earlier statute. *See Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 274-75 (1796) (Iredell, Circuit Justice), *reversed on other grounds*, *id.* at 237, 241-42, 245, 256.

treaties. A power-conferring interpretation of the clause is thus incompatible with the clause's declaration that "all" such treaties "shall be" the law of the land.

The power-conferring theory is also unsupported by the available evidence of the Framers' intent in adopting the clause. The Supremacy Clause was the mechanism adopted by the Framers to deter and correct treaty violations by the United States.[18] Before the adoption of the Constitution, state officials (including judges) were adhering to the British rule. They acknowledged that the United States had an international obligation to comply with its treaties, but they understood their duty as law-applying officials to be to enforce the existing state laws, even if they conflicted with treaty obligations, until those laws were modified or amended by the state legislatures.[19] The lack of a mechanism for deterring or correcting treaty violations attributable to the United States was among the deficiencies of the Articles of Confederation that most concerned the Framers.[20]

There was a consensus at the Constitutional Convention that the new Constitution should include an effective mechanism for correcting treaty violations. Two principal schemes were considered. Under the Virginia plan, treaties would not themselves have superseded pre-existing domestic laws once ratified. Congress was instead to have the power to "negative" state laws that conflicted with the nation's treaty obligations.[21] This scheme would thus have retained the British rule, but rather than rely on the state legislatures to repeal conflicting state laws, it would have given that responsibility to the federal legislature.

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[18] *See generally* Vázquez, *supra*, at 1102.

[19] *See Ware v. Hylton*, 3 U.S. (3 Dall.) at 277.

[20] *See generally* Vazquez, *supra*, at 1102.

[21] *See id.* at 1104-1106.

This scheme was ultimately rejected in favor of the New Jersey plan's scheme. Under this plan treaties themselves were given the force of law through the Supremacy Clause. 2 Farrand, *The Records of the Federal Convention of 1787* (rev.ed.1966) 27-29. Thus, the treaties themselves were to operate to amend or repeal inconsistent laws without action by either the state or federal legislatures. The state courts were specifically instructed to give effect to treaties as law, and the federal courts' jurisdiction was extended to cases "arising under" treaties to ensure that the state courts complied with this directive. The scheme that was adopted thus gave the courts, rather than the legislatures, the first-line responsibility of enforcing the nation's treaties insofar as they related to individuals.

This scheme was not uncontroversial. There were objections to giving treaties the force of law but excluding from the treaty-making process the most representative house of the legislature. Gouverneur Morris noted this anomaly and proposed correcting it by giving the House a role in the making of treaties. *Id.* at 392. Madison objected that it would be inconvenient to give such a role to as numerous a body as the House, as secrecy and dispatch were thought to be indispensable in treaty-making. *Id.* Morris responded that he was not disposed to make treaty-making too easy: the greater the difficulty of making treaties, Morris stated, the more seriously they will be taken. *Id.* at 393. Thus, the proposal for correcting the perceived anomaly was defended on the ground that it would advance the Supremacy Clause's purpose of maximizing treaty compliance.[22] No one suggested correcting the anomaly by adopting the British rule, which would have permitted one body to make treaties but another to give them domestic legal force. Such a rule would have compromised the

[22] Ultimately, Morris' proposal was rejected, primarily because of the perceived need for secrecy in the negotiation of treaties. *Id.* at 394.

Supremacy Clause's purpose by increasing the likelihood that treaties would bind us internationally but not be judicially enforceable domestically. This is, of course, what the power-conferring version of the Supremacy Clause would do. History thus undermines the power-conferring theory and fully support the Supremacy Clause's plain text: "all" treaties, once ratified, are the "supreme Law of the Land."

The power-conferring version of the self-execution doctrine is based not on text or history, but on dicta from this Court's decisions seeming to suggest that treaties that are not self-executing are not the law of the land, along with language suggesting that whether or not a treaty is self-executing is a matter of intent. As discussed in the next section, however, this Court's cases do not support the radical departure from the Supremacy Clause's text that the power-conferring theory would work. This Court's most recent treaty decision rejects the notion that a non-self-executing treaty is not the "law of the land," and confirms that the "self-execution" question has nothing to do with the treaty's status as "law of the land."[23]

There are, to be sure, circumstances in which a treaty that is valid and in force internationally does not have the force of domestic law, notwithstanding the Supremacy Clause. For example, if a subsequently enacted statute or a subsequently ratified treaty conflicts with an earlier treaty, the later statute or treaty supersedes the earlier treaty as the law of the land, even though the earlier treaty might continue to bind us internationally. It may well be that the President and Senate have the power to terminate a treaty's domestic legal force even without entering into a later treaty. If so, it may well follow that the President and Senate have the power affirmatively to

[23] *United States v. Alvarez Machain*, 112 S.Ct. 2188, 2195 (1992) ("The Extradition Treaty has the force of law, and if, as respondent asserts, it is self-executing, it would appear that a court must enforce it on behalf of an individual . . .").

countermand the Supremacy Clause's ordinary effect with respect to a particular treaty at the time of the treaty's ratification.[24] Recognizing this power, however, would do far less violence to the text of the Supremacy Clause than acceptance of the power-conferring theory would. The Supremacy Clause would remain the rule, and it would take an affirmative act of the treaty-makers to reverse it with respect to a particular treaty. But to go further and accept the petitioners' argument that a treaty lacks domestic legal force unless the treaty-makers have affirmatively demonstrated an intention to give it domestic legal force would require such a radical departure from the clause's terms that the interpretation must be rejected, if only on textual grounds.

This court need not consider whether the treaty makers have the power to deprive a treaty of its domestic legal force at the time of ratification by an affirmative act, such as by expressing an intention that the treaty not have domestic legal force. There is no evidence that the treaty makers entertained any such intent with respect to Article 33. Indeed, the statements petitioners rely on establish the opposite.

As petitioners recognize, Article 33 prohibited the United States from doing certain things that the Attorney General previously had discretion to do under then-existing statutes. *See* Opp. Brief 33-34 n.20. As this Court observed in *Stevic*, "the most significant difference" between Article 33 and the text of existing immigration laws was that the former "gave the refugee an entitlement to avoid deportation to a country in which his life or freedom would be threatened," whereas the latter

[24] The President and Senate purported to do this when they attached to the Torture Convention, Treaty Doc. 100-20, a reservation to the effect that the treaty was not "self-executing," by which they meant that the treaty lacked domestic legal force. *See* S. Exec. Report 101-30, Report of the Senate Committee on Foreign Relations on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 101st Cong., 2d Sess. at 12 (1990).

"merely provided the Attorney General with the discretion to grant withholding of deportation on grounds of persecution." 467 U.S. at 428-29 n.22. Despite the acknowledged differences between the Protocol and the statutory text, it was understood at the time of our accession that "no amendment of the existing statutory language was necessary" because it was contemplated that the Attorney General would "implement" and "honor the requirements of" Article 33 without legislative action. *Id.* at 429-30. This, of course, is fully consistent with the conclusion that Article 33 was immediately effective upon ratification as domestic law. It was unnecessary to amend the statute because Article 33 itself, as law of the land, limited the Attorney General's discretion. If, as this Court said in *Stevic*, Article 33 gave refugees a "right" and "entitlement" not to be delivered by the United States into the hands of their persecutors and existing domestic law did not give them that right, and if, as petitioners argue, Article 33 did not have the force of domestic law, then amendment of existing legislation *would have been required*. In light of the acknowledged differences between the treaty and the statute, the statement that no amendment of the statute was required must have been a recognition that Article 33 itself had domestic legal force and superseded the inconsistent provisions of the immigration law. To reach any other conclusion would be to accuse our treaty-makers of having no intention to grant to refugees the "right" and "entitlement" that Article 33 required us to provide them. The Court should be slow to attribute such bad faith to our treaty-makers.[25]

[25] *Cf. Chew Heong v. United States*, 112 U.S. 536, 540 (1884):

> Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact, that the honor of the government and people of the United States is involved in every inquiry whether rights secured by

Petitioners rely on this Court's statement in *Stevic* that, notwithstanding the difference between the dictates of Article 33 and the language of existing statutes, "the Attorney General could naturally accommodate the Protocol simply by exercising his discretion to grant such relief in each case in which the required showing was made, *and hence no amendment of the existing statutory language was necessary.*" Opp. Brief 33-34 n.20 (quoting *Stevic*, 467 U.S. at 429 n.22 (emphasis supplied by petitioners)). According to petitioners, "[t]his passage clearly indicates that if the Attorney General had been unable to accommodate the Protocol under the INA's provisions as then written, an 'amendment' of those provisions would have been 'necessary' for aliens to obtain relief." *Id.* This reads far too much into this Court's footnote.[26] To be sure, because Article 33, as law of the land, would have superseded any existing statute that required the Attorney General to deliver refugees into the hands of their persecutors, no amendment of such a statute would have been "necessary" to enable the Attorney

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> such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted.

[26] Petitioners' argument below that the Ninth Circuit followed this tortured line of reasoning in *Aguilar* when it relied on *Stevic* for the proposition that Article 33 was not self-executing is ludicrous. Citing footnote 22 of *Stevic*, the Ninth Circuit said that "the Protocol" was not self-executing, *Aguilar*, 883 F.2d at 680, without referring to any particular provision. The court was apparently relying on this Court's statement that Article 34 was "precatory and not self-executing." The Ninth Circuit thus made a common, and clear, error: it assumed that if one provision of a treaty is not self-executing, none is. The settled rule, however, is that one provision of a treaty may be self-executing while others are not. *Restatement (Third) of the Foreign Relations Law of the United States* § 111 Comment h (1987).

General to disregard it. Nevertheless, an amendment may have been considered "necessary" to eliminate the confusion that might be generated by a facial discrepancy between the law as written and Article 33.

Indeed, Congress subsequently did amend the immigration statutes to make it clear that the Attorney General did not have the discretion to deliver refugees into the hands of their persecutors. As the House Judiciary Committee Report states, and as this Court made clear in *Stevic*, this change was made "*for the sake of clarity*," *Stevic* at 428; H.R. Rep No. 96-608 at 17-18 (1979) (emphasis added). *See also* Pet. Brief 36 (noting that Congress "clarif[ied]" the statute when it amended it in 1980). These statements clearly reflect the understanding that Article 33 itself had domestic legal force. The amendment could have "clarified" existing law only if Article 33 itself served to limit the Attorney General's discretion.[27] Article 33 could have this effect only if it had the force of domestic law.[28]

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[27] For this reason, petitioners' statement that "Congress's subsequent efforts in 1980 to clarify 8 U.S.C. § 1182(h) to conform its language to that of the Protocol . . . is irreconcilable with the notion that the Protocol had independent domestic force" is baffling. Opp. Brief 36. The amendment could have "clarified" existing law only if the Attorney General's discretion had been limited before then. This Court's statement that the amendment was made "for the sake of clarity" thus establishes that Article 33 itself limited the Attorney General's discretion.

[28] Petitioners also rely on statements to the effect that "[a]ccession to the Protocol would not impinge adversely upon established practices under existing laws in the United States." S. Exec. K, 90th Cong., 2d Sess. III (1968) (message from Pres. Johnson), cited at Opp. Brief 36 n.21. *See also id.* at VII, VIII (report of Secretary of State Rusk) (same); S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 4 (1968); *id.* at 2 (Sen. Comm. report); 114 Cong. Rec. 29391 (1968) (statement of Sen. Mansfield). Those are merely statements that it was not then established practice to intercept refugees on the high seas and return them to the persecuting nation. The statements to the effect that "refugees in the United States have long enjoyed the protection and the rights which the Protocol calls for," quoted at Opp. Brief 36 n.21, mean only that "[t]he

In sum, Article 33 is the law of the land by virtue of the Supremacy Clause. There is no requirement that the President and Senate "intend" that a treaty be the law of the land. The power-conferring theory is incompatible with the clause's text and unsupported by either history or case law. This Court need not decide whether the President and the Senate can affirmatively countermand the Supremacy Clause with respect to a particular treaty upon ratification, for there is no evidence that the President and the Senate entertained any such intent in this case. Thus, if the statutes on which respondents rely are indeed territorially limited in their scope, as petitioners argue, and if Article 33 is not so limited, as the district court correctly found, then Article 33, as "supreme Law of the Land," itself limits petitioners' discretion to deliver respondents into the hands of their persecutors in Haiti.

II. ARTICLE 33 DOES NOT REQUIRE IMPLEMENTING LEGISLATION.

Though this Court recognized early on that the Supremacy Clause dispensed with the need for legislative action to give treaties domestic legal force,[29] it also recognized that certain treaties may nevertheless not be applied by the courts before implementing legislation has been enacted. Such treaties have become known as "non-self-executing" treaties. The distinction between self-executing and non-self-executing treaties has its source in this Court's decision in *Foster v. Neilson*, the only case in which this Court has denied relief on the ground that a treaty

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President and the Senate believed that the Protocol was *largely* consistent with existing law." *Stevic*, 467 U.S. at 417 (emphasis added). They hardly support the conclusion that, to the extent of any differences, the President and Senate intended that the Protocol not have domestic legal force. The statements discussed in the text establish the contrary.

[29] *Ware v. Hylton*, 3 U.S. (3 Dall.) at 237.

was not self-executing.[30] Although petitioners would interpret *Foster* as a virtual resuscitation of the British rule, Chief Justice Marshall's opinion shows that the category of "non-self-executing" treaty he recognized is quite limited in scope and does not embrace Article 33.

Marshall began the relevant portion of the *Foster* opinion by describing the domestic effect of treaties in countries that do not have a Supremacy Clause:

> A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially, so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

27 U.S. (2 Pet.) at 314. Petitioners cite lower court decisions that, in their view, interpret the foregoing language as establishing "a general presumption" that treaties may not be enforced in court by individuals.[31] In reality, this language merely restates the British rule. In the sentences that immediately follow, the Court made it clear that this rule was

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[30] With the possible exception of the cryptic discussion in *Cameron Septic Tank Company v. City of Knoxville, Iowa*, 227 U.S. 39, 50 (1913).

[31] *See, e.g.*, Opp. Brief 34-35, and Def. Opp. in *Baker* 28, citing *Tel-Oren*, 726 F.2d at 808; *United States* v. *Bent-Santana*, 774 F.2d 1545, 1550 (11th Cir. 1985); *Canadian Transport Co. v. United States*, 663 F. 2d 1081, 1092 (D.C. Cir. 1980); *Dreyfus v. Von Finck*, 534 F.2d 24, 29-30 (2d Cir.), *cert denied*, 429 U.S. 835 (1976); *Handel* v. *Artukovic*, 601 F. Supp. 1421 (C.D. Cal. 1985). We do not agree that these decisions say that there is any such presumption, but, if they do, they are based on misreadings of *Foster* and are erroneous for the reason set forth in the text. The other decision that petitioners cited to support their proposed general presumption, *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989), cannot be read to support any such presumption.

rejected by the Framers when they adopted the Supremacy Clause, which establishes the *opposite* rule in our country:

> In the United States, *a different principle is established*. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision.

Id. (emphasis added). *Foster* thus reaffirms that the Supremacy Clause rejects the British rule, gives all treaties the status of domestic law, and establishes as the general rule in this country that treaties *do not* require implementation by the legislature before they may be applied by the courts.

Marshall did say that a treaty is to be regarded by the courts of justice as the equivalent of an act of legislation only if it "operates of itself, without the aid of any legislative provision." This qualification is the source of the doctrine of self-executing treaties. To the extent the terms self-executing and non-self-executing can be said to be terms of art as applied to treaties, they refer to the distinction Marshall drew in *Foster*. The distinction, however, has "not [been] particularly well understood" by the courts.[32]

Foster involved a treaty providing that certain "grants shall be ratified and confirmed to the persons in possession [of the lands.]" 27 U.S. (2 Pet.) at 315. In determining whether the provision "operate[d] of itself, without the aid of any legislative provision," Marshall framed the issue as follows: "Do these words act directly on the grants, so as to give validity to those not otherwise valid? or do they pledge the faith of the United States to pass acts which shall ratify and confirm [the grants]?" *Id.* at 314. The issue was thus one of treaty interpretation, governed by the words of the provision, and the relevant

[32] *Noriega*, *supra note 6*, at 16.

question was whether those words "ratified and confirmed" the grants themselves or instead obligated the United States to "pass acts" to "ratify and confirm" the grants in the future. The Court read the "shall be ratified" language as contemplating a future act or ratification, but it said that its decision would have been different if the provision had said that the grants were "hereby" ratified and confirmed. *Id.* at 314.

That the issue was whether the treaty affirmatively contemplated a future act of ratification, and that this was a matter of treaty interpretation, were confirmed five years later in *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833), in which the Court reversed itself and held that the treaty involved in *Foster* was indeed self-executing. The Court's about-face on this point was the result of its review of the Spanish text, which provided that the grants "shall remain ratified and confirmed . . ." These words, the Court held, denoted that the grants were ratified and confirmed "by force of the instrument itself"; the treaty did not, as the Court had previously concluded, "stipulat[e] for some future legislative act." 32 U.S. at 88-89.[33]

Foster and *Percheman* thus establish that, although treaties in the United States do not as a general matter require legislative implementation before they may be applied by the courts, this rule may be modified by the parties through the treaty itself.[34]

[33] It is noteworthy that the so-called doctrine of self-executing treaties, which has so confounded the courts, has been constructed around a decision that the Court quickly thereafter concluded was wrongly decided.

[34] This conclusion was not as self-evident as Marshall made it out to be. Just as treaties in Great Britain require implementing legislation regardless of what the parties intended, the Court could have held that, in light of the supremacy clause, treaties in the United States do not require implementing legislation even if the parties intended to require it. In other words, it could have held that the rule that legislation is not required is not one that may be reversed by agreement. Underlying the Court's holding that legislation is required when the parties affirmatively so agree, therefore, is an unarticulated holding about our domestic separation of powers. Nevertheless, after the

The obligations the parties undertake in the treaty remain the law of the land, but if the obligation is an obligation to accomplish certain ends in the future through legislation, then our courts may not treat the end as having been accomplished until the legislation is enacted.[35]

Article 33 would fall within Marshall's category of non-self-executing treaty if, instead of itself prohibiting the return of refugees, it had provided that the contracting parties "shall enact laws prohibiting the return of refugees to a place where they would be persecuted."[36] This Court's decisions in

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Court's domestic separation-of-powers holding in *Foster*, legislation is required if the parties intended to require it.

[35] The test differs from the power-conferring theory discussed above in that (a) the default rule remains that no legislation is required, and (b) a stipulation of *the parties to the treaty*, not the unilateral intent of the U.S. treaty-makers, is necessary to reverse the rule. By focussing on what the parties agreed to (as opposed to what the U.S. treaty-makers unilaterally intended) the *Foster* rule is faithful to the Supremacy Clause, which conformed our domestic law with our international treaty obligations. The power-conferring theory, by contrast, would create a discrepancy between our domestic law with international obligation.

[36] The decision on which the district court and petitioners relied below, the Second Circuit's decision in *Bertrand v. Sava*, 684 F.2d 204 (2d Cir. 1982), apparently concluded that Article 33 established the latter obligation. Notwithstanding the provision's clear prohibitory language, the court concluded that Article 33 does not itself obligate the United States not to return refugees to countries where they would be persecuted, but instead obligates the United States to "adjust[]" its domestic law to prohibit the return of refugees to such countries. 684 F.2d at 218. For this proposition, the court relied on its earlier decision in *Stevic* v. *Sava*, 678 F.2d 401, 406 (2d Cir. 1982), *reversed*, 467 U.S. 407 (1983). What the Second Circuit had said in *Stevic*, however, was that, "[s]ince Article 33 of the Convention imposes an absolute obligation upon the United States, standards developed in an era of discretionary authority require some adjustment." *Id.* That does not suggest that the adjustment must be accomplished by legislation. As discussed above, it was clearly contemplated that, to the extent there was a discrepancy between

Cardozo-Fonseca and *Stevic* make it clear, however, that the obligation imposed by Article 33 is not an obligation to "pass acts" prohibiting the return of refugees to countries where they would be persecuted; rather, Article 33 itself, of its own force, "imposed a mandatory duty on contracting States not to return an alien to a country where his 'life or freedom would be threatened' on account of one of the enumerated reasons." *Cardoza Fonseca*, 480 U.S. at 429 (footnote omitted). *See also Stevic*, 467 U.S. at 429 n.22 (Article 33 gives refugees "right" and "entitlement").

This conclusion was inescapable. The terms of Article 33 cannot be construed as a requirement of legislation. Furthermore, numerous statements of executive branch officials at the time of the Protocol's transmission to the Senate establish the understanding of the United States that the Protocol conferred substantive rights directly on refugees. In transmitting the Protocol to the Senate for its advice and consent, President Johnson described the Protocol as "a comprehensive *Bill of Rights for refugees* fleeing their country because of persecution on account of their political views, race, religion, nationality, or social ties."[37] "*Foremost among the*

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what existing federal statutes required and what was required by the Protocol, U.S. officials would give effect to the Protocol's requirements as law within the framework of then-existing statutes – *i.e.*, without legislation. Executive and judicial officials were to adjust their standards without legislative action because the treaty itself so required.

[37] Message from the President of the United States transmitting the Protocol Relating to the Status of Refugees, S. Exec. K, 90th Cong., 2d Sess. III (1968) (emphasis added). *See also* Letter of Submittal of the Secretary of State Rusk to President Johnson regarding Protocol Relating to the Status of Refugees, S. Exec. K, 90th Cong., 2nd Sess. V (1968) ("[The Refugee Convention] constituted the most comprehensive *codification of the rights of refugees* so far attempted on an international level." (emphasis added)); S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 4 (1968) (testimony of Lawrence A. Dawson, Acting Deputy Director, Officer of Refugee and Migration Affairs) ("The Protocol

humanitarian rights which the Protocol *provides* is *the prohibition* against expulsion or return of refugees to any country where they would face persecution." *Id.* (emphasis added). This "foremost . . . right" guaranteed by the Protocol is precisely the "right" embodied in Article 33. In light of these statements, it cannot be maintained that Article 33 "stipulated for some future legislative act."

Petitioners argued below that Article III of the Protocol is such a stipulation. Article III requires the contracting states to "communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of the present Protocol." This provision does not support petitioners' conclusion for two reasons. First, as petitioners acknowledged below, in many countries treaties never have domestic legal force. Def. Opp. 30; *Baker* Brief 25. In such countries, treaties always require implementing legislation. Article III's reference to "laws [the contracting parties] may adopt" may thus be a reference to the laws adopted by states that require legislation in all circumstances. It does not suggest that the parties contemplated legislation by states that give treaties automatic domestic legal force. Second, the Protocol includes provisions that appear to contemplate legislation even in countries, such as the United States, in which treaties have automatic domestic legal force. Article 34, for example, was described by this Court in *Stevic* as "precatory and not self-executing." 467 U.S. at 429 n.22. Thus, Article III's reference to "laws [the contracting parties] may adopt" may also be a reference to laws giving effect to provisions of the Protocol, such as Article 34, that leave the parties with discretion regarding the manner of achieving those provisions' aspirations. In light of these two possibilities, Article III simply

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is a human *rights* document." (emphasis added)); *id*. at 6 ("[T]he Protocol deals entirely in the sphere of standards of protection and *rights for refugees*." (emphasis added)).

does not support an inference that, despite Article 33's clear prohibitory language, the provision actually imposes an obligation to pass acts to prohibit the return of refugees to countries where they would be persecuted.[38] In sum, this Court's prior decisions and the statements of the Executive upon transmitting the Protocol to the Senate for its advice and consent confirm what the plain text of Article 33 leaves no room to doubt: the provision itself imposes an immediately effective obligation not to deliver refugees into the hands of their persecutors. It does not impose an obligation to take steps in the future to prohibit the return of refugees to their persecutors. It is accordingly "self-executing" in the sense contemplated in *Foster* and *Percheman*.

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[38] For the foregoing reasons, the district court decision in *Gracey*, *supra*, relied on below by petitioners, is simply wrong. Judge Bork's solitary concurrence in *Tel-Oren*, 726 F.2d at 798, is similarly flawed. *Postal* does not support petitioners' reliance on Article III. The treaty provisions the *Postal* court was referring to provided that "*[e]very* State shall take the necessary legislative measures" to achieve certain ends. 589 F.2d at 876 (footnote omitted; emphasis added). They thus appeared to contemplate the enactment of legislation on the part of *every* party – whereas the Protocol simply requires parties to inform the United Nations of the laws they "may" enact, thus acknowledging that legislation may not be required in some countries. Moreover, in *Postal* the quoted language appeared *in each of the provisions to which the court referred*, whereas Article 33 is not accompanied by any such implementation rider. The court said in *Postal* that "*[s]uch provisions* are uniformly declared executory." 589 F.2d at 876-77 (emphasis added). It is obviously a very different matter to conclude that *a single provision* in a treaty requiring the parties to notify a depository of legislation they may enact renders *every provision* of the treaty executory. The *Gracey* court's paraphrase of *Postal* demonstrates its error. In holding that Article III of the Protocol rendered the entire Protocol non-self-executing, the *Gracey* court quoted *Postal* for the proposition that "treaties with '[s]uch provisions are uniformly declared executory.'" 600 F. Supp. at 1406. The words "treaties with" do not appear in *Postal*. The *Gracey* court thus fundamentally altered the statement it purported to be quoting.

III. ARTICLE 33 ESTABLISHES JUSTICIABLE OBLIGATIONS.

Dicta in this Court's more recent decisions suggest that a treaty may have to be implemented by legislation before it may be enforced in court even if the parties did not specifically agree that legislation would be required. In *Stevic*, this Court said that Article 34 of the Convention was not self-executing because its language was "precatory." 467 U.S. at 429 n.22. In *Head Money Cases*, this Court suggested that a treaty is not enforceable in court by individuals unless it "prescribe[s] a rule by which the rights of [individuals] may be determined." 112 U.S. 580, 598-99 (1884). These tests differ from that of *Foster* and *Percheman* in that they do not turn on an intent to require legislation. Instead, they reflect the view that certain rules are, under our system of separated powers, not for the courts to enforce.

Although the courts often describe a treaty that is unenforceable on these grounds as "non-self-executing," *see Stevic*, these grounds of unenforceability are not unique to treaties. A statute that is "precatory" is similarly unenforceable in court,[39] as is a statute that does not prescribe a rule by which the rights of the plaintiff may be determined.[40] A treaty that shares these characteristics is unenforceable in court for the familiar reason that courts exist, solely, to enforce the rights of individuals.[41] If a treaty or a statute does not impose a "duty" on the defendant, either because it is precatory or

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[39] Cf. *Pennhurst State Sch. & Hosp.* v. *Haldeman*, 451 U.S. 1, 24 (1981); *see generally* Vázquez, *supra*, at 1124.

[40] Cf. *Baker* v. *Carr*, 369 U.S. 186, 217 (1962) (lack of "judicially discoverable and manageable standards" reduces likelihood that legal provision will be enforceable in court).

[41] *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

because what it requires of the defendant is insufficiently spelled out, it does not give the plaintiff a correlative right.

Article 33 is clearly "self-executing" in this sense. Article 33's nonrefoulement obligation is not precatory but "mandatory." *Cardoza Fonseca*, 480 U.S. at 429. Nor can it be argued that Article 33 does not "prescribe a rule by which the rights of the private citizen or subject may be determined." *Head Money Cases*, 112 U.S. at 598-99. This Court had no difficulty discerning the content of Article 33's non-refoulement obligation in *Stevic*, and petitioners routinely enforce it with respect to refugees who have reached our shores.[42] Indeed, it is difficult to conceive of a situation in which an immediately effective, mandatory treaty obligation *not* to commit a well-defined act would require legislative implementation. As the court said in *Commonwealth v. Hawes*,[43] a decision that the author of *Head Money Cases* called "very able" in an opinion for

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[42] This Court's discussion in *Stevic* of Articles 33 and 34 of the Convention illustrates the correct application of this test for determining whether a treaty provision is self-executing, and confirms that Article 33 is self-executing. Article 34 provides in full as follows:

> The Contracting States shall *as far as possible* facilitate the assimilation and naturalization of refugees. They shall in particular *make every effort* to expedite naturalization proceedings and to reduce *as far as possible* the charges and costs of such proceedings." (Emphasis added.)

Because of its "precatory" language, its express contemplation of future affirmative acts, and its ambiguity concerning what is required, Article 34 is exactly the kind of treaty provision that has always been thought to be unenforceable in court without legislative fleshing out, and this Court accordingly so held in *Stevic*. 467 U.S. at 428-29 n.22. By contrast, because it imposes a clear, unambiguous and immediately effective obligation and establishes correlative rights of individuals, Article 33 exemplifies the type of provision that has consistently been considered self-executing.

[43] 76 Ky. (13 Bush) 697, 702-03 (1878).

the Court just two years later:[44]

> When it is provided by treaty that certain acts *shall not be done*, or that certain limitations or restrictions shall not be disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override those limitations or to exceed the prescribed restrictions, for the palpable and all-sufficient reason, that to do so would be not only to violate the public faith, but to transgress the "supreme law of the land." (Emphasis added.)

When the obligation is prohibitory, unambiguous, and immediately effective, congressional "implementation" would simply repeat the prohibition and emphasize that "we mean it." The Supremacy Clause dispenses with the need for such embellishment.

IV. ARTICLE 33 NEED NOT CONFER A PRIVATE RIGHT OF ACTION.

Petitioners argued below that Article 33 was non-self-executing because it did not itself establish a private right of action. They argued that a treaty must be self-executing in this respect in order to be enforced by an individual in a court: "[A]n individual can enforce a treaty in court only to the extent that the treaty provides a directly enforceable private right of action." *Baker* Brief 24.

This argument is demonstrably wrong. Although a treaty that does not itself confer a right of action may be described as not

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[44] *United States* v. *Rauscher*, 119 U.S. 407, 428 (1886). *See also Restatement (Third) of the Foreign Relations of the United States* § 111.

"self-executing" in respect to remedies,[45] a treaty may be enforced by individuals in court even if it is not self-executing in this sense. If there is another source for the plaintiff's right of action, a treaty is enforceable in court as long as it establishes the defendant's obligation to behave in a given way towards the plaintiff – in other words, if it establishes the defendant's primary obligation and the plaintiff's correlative primary right.[46] As shown above, Article 33 plainly establishes the United States' obligation not to return refugees to a country in which they would be persecuted, and respondent's correlative right not to be returned. Respondents' right of action is conferred by the APA.

In numerous treaty cases, the right of action was conferred not by the treaty itself, but by the common law; the treaty merely established the defendant's duty (and the plaintiff's

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[45] *See* Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1112 (1991) (asking whether constitution may be said to be self-executing in regard to remedies). *See generally* Vázquez, *supra*, at 1117-1119.

[46] The distinction between a right and a right of action is a familiar, if often overlooked, one. This Court has held that, "[i]n deciding whether a federal right has been violated, we have considered [1] whether the provision in question creates obligations binding on the governmental unit or rather 'does no more than express a congressional preference for certain kinds of treatment.' [2] The interest the plaintiff asserts must not be 'too vague and amorphous' to be 'beyond the competence of the judiciary to enforce.' [3] We have also asked whether the provision in question was 'intend[ed] to benefit' the putative plaintiff." *Dennis* v. *Higgins*, 111 S. Ct. 865, 871 (1991) (citations omitted). If there is a "right," the right of action may be conferred by, *inter alia*, 42 U.S.C. § 1983. *See id*. *See generally* Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 Colum. L. Rev. 233 (1991) (distinguishing between "primary rights" and "remedial rights"). Article 33 plainly confers a "right" on respondents under the *Dennis* criteria.

correlative right).[47] In other cases, the right of action was conferred by federal or state statute.[48] Respondents rely on the APA for their right of action. The APA provides a right of action for declaratory and injunctive relief to persons suffering "legal wrong" as a result of federal agency action. *See Japan Whaling Ass'n* v. *American Cetacean Soc.*, 478 U.S. 221, 231 n.4 (1986). Because Article 33 is the law of the land, agency action that violates that provision inflicts a "legal wrong" and entitles persons "adversely affected or aggrieved by [such] action" to judicial review thereof. 5 U.S.C. § 702 (1988).[49] Respondents fit comfortably within that class, as they are plainly within the "'zone of interests' sought to be protected" by Article 33. *See Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. 3177, 3186 (1990)(citation omitted).[50]

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[47] See *e.g. Florida* v. *Furman*, 180 U.S. 402 (1901) (action to remove cloud on legal title); *Botiller* v. *Dominguez*, 130 U.S. 238, 243 (1889) (ejectment); *Hauenstein* v. *Lynham*, 100 U.S. 483 (1879) (action "pursuant to a law of the State"); *Orr* v. *Hodgson*, 17 U.S. (4 Wheat.) 453, 462-63 (1819) (bill in equity); *Chirac* v. *Chirac*, 15 U.S. (2 Wheat.) 259, 277 (1817) (ejectment); *Harden* v. *Fisher*, 14 U.S. (1 Wheat.) 300, 303 (1816) (same); *Foster*, *supra* (same); *Ware*, *supra* (action in debt). *See generally* Vázquez, *supra*, at 1144 & nn.256-258.

[48] See *Chew Heong*, *supra* (habeas corpus action based on treaty provision); *Asakura* v. *Seattle*, 265 U.S. 332 (1924) (state action for injunction); *Jordan* v. *Tashiro*, 278 U.S. 123 (1928) (state mandamus action).

[49] The APA affords a right of action to challenge agency action that is unlawful because it violates a treaty. *See* Vázquez, *supra*, at 1147-48. Indeed, petitioners conceded in *Baker* that, "assuming that Article 33 imposes the obligations plaintiffs assert and were 'self-executing' in some broader sense, the current action for injunctive relief could . . . proceed as an APA action, and would therefore be subject to APA limitations." *Baker* Reply Brief 18 n.22.

[50] The self-execution decisions in which the court considered whether the treaty conferred a right of action were cases in which the plaintiff sought damages against private parties. *See*, *e.g.*, *Tel-Oren*, 726 F.2d at 775; *Mannington Mills Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1290 (3d Cir. 1979); *Dreyfus* v. *Von Finck*, 534 F.2d at 26; *Handel* v. *Artukovic*, 601 F. Supp. 1421. The APA thus did not supply a right of action, and the courts could discern no other basis for the right of action. Under such circumstances, it is appropriate for the court to consider whether the treaty confers the right of action. But the treaty need not confer a right of action if the plaintiff seeks declaratory or injunctive relief against federal officials. The right of action in such cases is furnished by the APA.

The APA right of action is unavailable if "statutes preclude judicial review" or if the challenged action is committed to agency discretion by law. 5 U.S.C. § 701 (1977 & Supp. 1992). Article 33 removes any discretion petitioners may have had to deliver refugees to their persecutors. Petitioners argue that the INA is a "statute preclud[ing] judicial review" under the APA. Respondents decisively rebut this argument in their brief, and we do not repeat their rebuttal here. We note, however, that petitioners' argument that the INA preempts respondents' APA right of action to enforce Article 33 is even weaker than their argument that the INA preempts respondents' APA right of action to enforce Section 243(h). Petitioners argue that respondents cannot avail themselves of Section 243(h) because statutes are presumed to apply only within our borders. But the same presumption against extraterritoriality would, if applied in this context, also defeat petitioners' argument that the INA takes away respondents' APA right of action to enforce Article 33. If the INA applies only within our borders and thus does not apply to this case, as petitioners argue, it cannot be a "statute [that] precludes judicial review" over this case. Thus, if Article 33 applies to respondents on the high seas, but the INA is territorially limited, as petitioners argue, respondents may maintain this action for an injunction under the APA.

CONCLUSION

For the foregoing reasons, the Lawyers Committee for Human Rights respectfully urges the Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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